**Southwest Regional Council of Carpenters and BrandSafway Services, LLC *and* Laborers International Union of North America, Local 169.** Case 32–CD–251616

June 30, 2020

# DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). BrandSafway Services, LLC (the Employer) filed a charge on November 12, 2019, alleging that the Respondent, Southwest Regional Council of Carpenters (Southwest Council), violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers' International Union of North America, Local 169 (Local 169). A hearing was held on February 18, 2020, before Hearing Officer Alexander M. Hajduk.[1] During the hearing, Local 169 introduced a motion to quash the Section 10(k) notice of hearing, in which it asserted that Local 169 had not claimed the disputed work. Thereafter, the Employer, Southwest Council, and Local 169 filed posthearing briefs.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

## I. JURISDICTION

The parties stipulated that the Employer annually sells and ships goods valued in excess of $50,000 from its facility located in or about the Reno, Nevada area to customers located outside of the state of Nevada. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that Southwest Council and Local 169 are labor organizations within the meaning of Section 2(5) of the Act.

## II. THE DISPUTE

### *A. Background and Facts of Dispute*

The Employer provides scaffolding services for construction projects, including delivering, assembling, disassembling, and removing scaffolding. From early 2019 until August 2019,[2] the Employer provided scaffolding for the Marriott Aloft hotel project in Reno, Nevada. It hired employees represented by Southwest Council to perform this work pursuant to their longstanding relationship, currently embodied in a collective-bargaining agreement in effect from July 1, 2018, to June 30, 2023. The agreement provides that "[t]he character of such work covered by this Agreement shall include but not be limited to . . . scaffold [work]."

On August 1, Local 169 sent a letter to the Employer and Brand Energy Services, which Local 169 believed was a predecessor to the Employer, informing them that Local 169 was filing a grievance against the Employer for assigning the scaffolding work at the Aloft hotel project, as well as "other work in the Union's Jurisdiction," to Southwest Council in violation of the Laborers' Master Agreement (LMA). The LMA provides that employees represented by Local 169 are assigned work "[t]ending to Carpenters, handling and distributing materials used by Carpenters," which includes delivery and distribution of scaffold components. Although Brand Energy Services was a successor to Brand Scaffold Rental and Erection, which was a signatory to a Local 169 Short Form Agreement binding it to the LMA, the Employer denied that it was a successor to Brand Energy Services.

On September 9, having learned from its business agents that Local 169 had claimed the work on the Aloft hotel project and work in northern Nevada generally, Southwest Council sent the Employer a letter threatening to strike and picket all the Employer's jobs in northern Nevada if the Employer reassigned that work to Local 169.

During meetings on September 10 and 27, after Southwest Council–represented employees had performed the work in question, the Employer resolved the confusion about its corporate predecessor.[3] The Employer and Local 169 agreed that the Employer was a successor to a different entity, Safway Services, LLC. Thereafter, Local 169 sent the Employer a letter asserting that the Employer, as a successor to Safway Services, LLC, was bound to the LMA. On October 2, Local 169 sent the Employer

[1] The notice of hearing, which issued on December 23, 2019, set the hearing date for February 10, 2020. The Region, however, inadvertently failed to serve the notice on Local 169. The record opened on February 10, 2020, but no evidence was taken. The hearing was continued and rescheduled for February 18, 2020. The record closed on February 21, 2020.

[2] All subsequent dates are in 2019 unless otherwise noted.

[3] All parties now agree that Brand Energy Services and the Employer are separate entities. On October 31, Local 169 amended the August 1 grievance to address work assignment issues with Brand Energy Services and its successor, Brandsafway Industries, LLC, which are unrelated to the dispute in the instant case. On January 22, 2020, Local 169 settled its grievance with Brandsafway Industries.

another letter, informing it that Local 169 was filing a grievance to determine whether the Employer was bound to the LMA. The Employer responded that it was "not willing to submit to the grievance and arbitration process in the [LMA]" because it disputed that Safway Services, LLC, had ever been a party to the LMA.

On February 14, 2020, the Employer emailed Local 169 with a list of other construction projects on which it was performing scaffolding work, including the Double R office building in Reno, Nevada. The Employer asked Local 169 to respond to the email if it was planning to claim work on these projects, stating that it would interpret no response as Local 169 disclaiming the work. The record does not establish whether Local 169 responded to the Employer.

On February 18, 2020, the Employer's construction manager at the Double R project sent the Employer photos that purportedly show a Local 169 business agent photographing the scaffolding work at the Double R project.

### *B. Work in Dispute*

The parties stipulated, and we find, that the work in dispute is the loading/unloading, moving, erecting, and dismantling of scaffolding and related cleanup at the Marriott Aloft hotel project in Reno, Nevada.

### *C. Contentions of the Parties*

Local 169 moves to quash the notice of hearing, arguing that there are no competing claims for the work in dispute because it has not made a claim for that work. To begin, it contends that its August 1 grievance was not a claim for the disputed work because it was later amended and filed against an entity not party to this proceeding. It also contends that its October 2 grievance was not a claim for the disputed work because it seeks only to determine whether the Employer is bound by the LMA as a successor to Safway Services, LLC, which Local 169 asserts was a signatory to the LMA. Local 169 therefore argues that the October 2 grievance is for breach of contract and not a claim for work, citing, among other cases, *Laborers* (*Capitol Drilling Supplies)*, 318 NLRB 809 (1995). Finally, it argues that it has not made a claim for the disputed work because Local 169 Business Manager Richard Daly "testified truthfully that, until there is a resolution of the October 2, 2019, grievance he could not know what the future might hold, or what path [Local 169] might choose."[4] In addition to asserting that it did not claim the disputed work, Local 169 also argues that because there is still a question whether the Employer has an agreement with Local 169, it would be inappropriate for the Board to decide the jurisdictional dispute.

The Employer contends that Local 169 claimed the disputed work by filing the August 1 grievance. The Employer also argues that Local 169 did not disclaim the disputed work in either the October 2 grievance or the October 31 amendment to the August 1 grievance, nor did it disclaim the work at the hearing.

Southwest Council contends that Local 169 claimed the work through its August 1 and October 2 grievances. Southwest Council argues that these grievances are claims for work, not for breach of contract, and that *Capitol Drilling*, above, is distinguishable. Accordingly, Southwest Council contends that Local 169's motion to quash should be denied and that the Board should decide this jurisdictional dispute.

On the merits, the Employer and Southwest Council assert that the work in dispute should be awarded to employees represented by Southwest Council based on the following factors: Board certifications and collective-bargaining agreements; employer preference, current assignment, and past practice; area and industry practice; relative skills and training; and economy and efficiency of operations.

### *D. Applicability of the Statute*

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. See, e.g., *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). On this record, we find that these requirements have been met.

#### 1. Competing claims for work

The performance of the disputed work by Southwest Council–represented employees establishes Southwest Council's claim to that work. *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74, 76 (1973); see also *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) (citing *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998 fn. 6 (2003)). In addition, Southwest Council's threat of job actions if the Employer gave any of the disputed work to Local 169 constituted a claim to

[4] In fact, Daly provided evasive testimony on this point. For example, when asked directly whether Local 169 would claim the work if an arbitrator found the Employer was bound to the LMA, Daly replied simply that Local 169 would "expect [the Employer] to follow the terms and conditions of the agreement."

the work. See, e.g., *Thomas Industrial Coatings*, above at 992.

We find, despite its claims to the contrary, that Local 169 has also claimed the disputed work. Local 169 filed the August 1 grievance because it "recently observed workers employed by [the Employer] performing work, covered by the [LMA] in effect between the Union and [the Employer] on the Aloft Hotel project in Reno, and the Union recently became aware that [the Employer] has been performing other work in the Union's Jurisdiction." The LMA requires "employees to be cleared through the hiring hall of the Union." Local 169 also filed the October 2 grievance to determine whether the Employer is bound by the LMA.

Local 169's arguments that its grievances did not constitute a claim for the disputed work are unconvincing. First, Local 169 never effectively disclaimed the disputed work claimed in the August 1 grievance, either when it amended the August 1 grievance or when it filed the October 2 grievance. The Board has found that a disclaimer of disputed work can eliminate a jurisdictional dispute only if the disclaimer is "'clear, unequivocal, and unqualified and disclaim[s] all interest in the work in dispute.'" *Bakery Workers Local 334 (Interstate Brand Corp.)*, 334 NLRB 1161, 1163 (2001) (quoting *Machinists Local 724 (ATSL, Inc.)*, 317 NLRB 781, 782 (1995)). It is clear that Local 169's August 1 grievance constituted a claim for the disputed work.[5] The grievance eventually settled, but Local 169 never disclaimed the disputed work. As for the October 2 grievance, Local 169 Business Manager Daly admitted that if the arbitrator sustained the grievance and found the Employer was bound by the LMA, Local 169 would expect the Employer to "abide by the terms of the agreement," i.e., the LMA. Because Local 169 asserted in its August 1 grievance that the LMA would require assignment of the disputed work to employees it represents, the October 2 grievance to determine whether the Employer is bound by the agreement is also tantamount to a claim for the disputed work.

Second, Local 169's argument that its October 2 grievance made no claim to the disputed work under *Capitol Drilling* is unpersuasive. In *Capitol Drilling*, the Board found that because the union's grievance was filed only against the general contractor, not the subcontractor that actually assigned the work at issue, there was no competing claim for the work being performed by employees of the subcontractor. 318 NLRB at 810–812. Here, Local 169's grievance was directed at the Employer, a subcontractor that had assigned the disputed work to employees represented by Southwest Council. As discussed above, the August 1 grievance expressly claimed the work under the LMA, and the October 2 grievance effectively claimed the work on the condition that the Employer was bound to the LMA. Accordingly, this case presents a traditional jurisdictional dispute in which each union claims that its contract covers the work at issue. See, e.g., *Carpenters Southeast Missouri District Council (International Riggers)*, 306 NLRB 561, 562–563 (1992); *Carpenters Los Angeles Council (Swinerton & Walberg)*, 298 NLRB 412, 413–414 (1990).[6]

2. Use of proscribed means

We find reasonable cause to believe that Southwest Council used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As noted above, on September 9, 2019, Southwest Council sent a letter to the Employer threatening to "strik[e] and picket[] all [its] jobs" if the Employer reassigned the scaffolding work in northern Nevada to Local 169. The Board has long considered such threats to be a proscribed means of enforcing claims to disputed work. See, e.g., *Washington & Northern Idaho District Council of Laborers (Skanska USA Building, Inc.)*, 366 NLRB No. 161, slip op. at 3 (2018); *Laborers Local 1184 (High Light Electric)*, 355 NLRB 167, 169 (2010); *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004).

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon mechanism for the voluntary resolution of this dispute.

Based on the foregoing factors, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that there is no agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination, and we deny Local 169's motion to quash the notice of hearing.

*E. Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961). The Board has

[5] As noted above, although Local 169 amended this grievance on October 31, the amendment was not related to the work assignment question at issue.

[6] Contrary to Local 169's contentions, a union can make a claim for work even if there is no contractual relationship between the union and employer. *International Brotherhood of Electrical Workers Local 71 (Thompson Electric, Inc.)*, 362 NLRB 1176, 1178 (2015) (finding demand for work when union asked employer to "join" or sign a project labor agreement), and cases cited therein; *Carpenters Northeast Ohio Council Local 1929 (Luedtke Engineering)*, 307 NLRB 1323, 1324 (1992) (finding expiration of one union's contract did not transform jurisdictional dispute into contractual dispute).

held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Board certifications and collective-bargaining agreements

There is no evidence of any Board certification concerning any of the employees involved in this dispute.

As mentioned above, however, the Employer and Southwest Council have a longstanding relationship, most recently embodied in a collective-bargaining agreement in effect from July 1, 2018, to June 30, 2023. It includes language that clearly covers the work in dispute: "[t]he character of such work covered by this Agreement shall include but not be limited to . . . scaffold [work]." There is no evidence that Local 169 has a collective-bargaining agreement with the Employer covering the work in dispute. Although Local 169 asserts that the Employer is bound to the LMA as a successor to Safway Services, LLC, Local 169 has failed to establish that Safway Services was itself bound to the LMA.[7] Accordingly, we find that the factor of collective-bargaining agreements favors awarding the disputed work to employees represented by Southwest Council.

2. Employer preference, current assignment, and past practice

Matt Headrick, the Employer's southwest branch manager, testified that the Employer prefers that the work in dispute be performed by employees represented by the Southwest Council. In addition, he testified that the Employer's current assignment of this work to Southwest Council–represented employees is consistent with its past practice. We find that the factors of employer preference, current assignment, and past practice favor awarding the work in dispute to employees represented by Southwest Council.

3. Industry and area practice

Frank Hawk, chief operating officer and regional vice president for Southwest Council, testified that he knows of 10 or 12 other contractors in northern Nevada that provide scaffolding services exclusively. Hawk testified that those contractors, like the Employer, all use employees represented by Southwest Council. He also testified that Southwest Council provided scaffolding services to over 100 other contractors in the Reno area. Local 169 business manager Daly, in turn, testified that employees represented by Local 169 performed scaffolding work with Brand Scaffold Rental and Erection until 2008, and then with its successor, Brand Energy Services, in 2016 and 2017. Daly further testified that the last scaffolding project Local 169–represented employees had worked on was for BrandSafway Industries, the successor to Brand Energy Services, in 2017. Based on this evidence, we find that this factor does not favor an award of the work in dispute to either employee group.

4. Relative skills and training

Hawk testified that Southwest Council administers a state-recognized, 4-year training program that provides training exclusively in scaffolding. Headrick testified that he had visited Southwest Council's training center and that it provides comprehensive training in different types of scaffolding. He also testified that the Employer was able to continue to win jobs based on the high quality of work performed by Southwest Council–represented employees. He was not familiar with the quality of scaffolding work performed by Local 169–represented employees.

Daly testified that Local 169 provides scaffold erecting training only peripherally. Local 169 has a 2-year program, which emphasizes familiarity with scaffolding materials and understanding how they go together; the focus is not on erecting the scaffolding. He testified that Local 169–represented employees tend to carpenters, bringing materials off the truck and handing them materials at the point of installation. Daly also testified that Local 169–represented employees *can* perform the scaffolding work that Southwest Council–represented employees perform, but they ordinarily do not. We find that this factor favors awarding the disputed work to employees represented by Southwest Council.

5. Economy and efficiency of operations

Headrick testified that it was more efficient to have Southwest Council–represented employees perform all the scaffolding work because they perform all aspects of scaffolding work. He observed specifically that employees represented by Southwest Council are not limited to a certain scope of work or certain tasks. We find that this factor favors awarding the disputed work to employees represented by Southwest Council.

CONCLUSIONS

After considering all of the relevant factors, we conclude that employees represented by Southwest Council

[7] Although this issue was addressed in Local 169's October 2 grievance, which at the time of the hearing had been scheduled for arbitration, Local 169's claim that the Employer is bound to the LMA is purely conjectural at this point. Notably, the record is devoid of any documentary evidence showing that the Employer was ever bound to the LMA.

are entitled to perform the work in dispute. We reach this conclusion relying on the following factors: Board certifications and collective-bargaining agreements; employer preference, current assignment, and past practice; relative skills and training; and economy and efficiency of operations. In making this determination, we award the work to employees represented by Southwest Council, not to that labor organization or to its members.

SCOPE OF THE AWARD

The Employer and Southwest Council maintain that our award in this proceeding should encompass the entire geographic area in which the Employer performs the work and the competing unions' jurisdictions overlap because disagreements and further unlawful conduct over the assignment of the disputed work will continue to arise on future projects. In support, they cite Local 169's August 1 grievance that also referred to "other work" in its jurisdiction, Local 169's October 2 grievance to determine whether the Employer is bound by the LMA, and photos taken as recently as February 18, 2020, that purportedly show a Local 169 business agent taking pictures of the Double R worksite where Southwest Council–represented employees were performing scaffolding work. Local 169 opposes the broad award because it is contrary to Board policy and it was not illegal for Local 169's business agent to be present at or photograph the scaffolding at one of the Employer's other worksites.

The Board normally limits a Section 10(k) award to the jobsite that was the subject of the unlawful Section 8(b)(4)(D) conduct or threats. See *Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 546 (2004). To justify an areawide award, there must be (1) evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur, and (2) evidence demonstrating the offending union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute. See, e.g., *Laborers' International Union of North America, Local 860 (Ballast Construction, Inc.)*, 364 NLRB No. 126, slip op. at 6 (2016).

We find that an areawide award of the disputed work is not warranted here. The Board generally declines to issue such an award where, as here, the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See, e.g., *Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174, slip op. at 5 (2018). No aspects of this case justify departing from the Board's general practice. Here, the record does not indicate that the disputed work has been a continuous source of controversy and will continue to be so. The dispute was the first substantiated controversy arising over the disputed work and involved only one of the Employer's jobsites. Accord *Prate Installations*, above at 546 (finding no proclivity for offending union to engage in further unlawful conduct where dispute was "the first substantiated controversy arising over the disputed work"). Further, even assuming that Local 169 prevails on its October 2 grievance, there is no independent evidence that Southwest Council is likely to engage in unlawful conduct at future job sites in pursuit of work similar to that in dispute. Id; see also *Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174, slip op. at 5 (citing *Laborers Local 22 (AGC of Massachusetts)*, 283 NLRB 605, 608 (1987)). Accordingly, we shall limit the present determination to the disputed work located at the Marriott Aloft hotel jobsite in Reno, Nevada. See, e.g., *Laborers Local 210 (Concrete Cutting & Breaking)*, 328 NLRB 1314, 1316 (1999).

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of BrandSafway Services, LLC represented by Southwest Regional Council of Carpenters are entitled to perform the loading/unloading, moving, erecting, and dismantling of scaffolding and related cleanup at the Marriott Aloft hotel project in Reno, Nevada.

Dated, Washington, D.C. June 30, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD